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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 863 of 1998

in

SPECIAL CIVIL APPLICATION No 4439 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and  
 MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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RANJITSINGH JOGINDARSINGH GILL

Versus

STATE OF GUJARAT  
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Appearance:

MR BS PATEL for Appellant

MR.PG DESAI, GOVERNMENT PLEADER for Respondent No. 1

SERVED BY AFFIX.(N) for Respondent No. 3  
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CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE A.M.KAPADIA

Date of decision: 25/08/98

ORAL JUDGEMENT

( PER : C.K.THAKKAR, J. )

#. This appeal is filed against dismissal Special Civil Application No. 4439 of 1998 by the learned Single Judge by an order dated June 19,1998.

#. To appreciate the controversy raised in this appeal, few relevant facts may now be stated;

It is the case of the appellant that on April 24,1998, an order was passed by the District Magistrate, Vadodara, respondent No.2 herein, directing the detention of the appellant under the Prevention of Black Marketing and Maintenance of Supply of Essential Commodities Act,1980 (hereinafter referred to as the 'Act'). It is the case of the appellant that Demala Enterprise, Baroda was dealing in sale and distribution of kerosine. Girdharilal Gulabbhai Demala was doing business in Shed No.988/13, GIDC, Makkarpura, Vadodara. The appellant was working as Manager and he was also holding power of attorney of Girdharilal Demala. According to the appellant, by a public notice dated September 15,1997, said Girdharilal Demala cancelled power of attorney given to the appellant and the appellant was relieved as manager of Demala Enterprise. It is stated in petition filed by appellant - petitioner that Civil Supply Department, Vadodara found certain irregularities in the business of Demala Enterprise. A raid was carried out in the business premises of Demala Enterprise and irregularities were noticed. Meanwhile, Assembly Elections took place in which new Government was elected which is now in power. The Minister for Civil Supply belongs to the same State from which appellant hails. It

is the say of appellant, that Hon'ble Minister for Civil Supply is neither related to him nor the appellant has personal relations with the Hon'ble Minister. But only with a view to harass the appellant, Mr.Yogesh Patel, respondent No.3 herein, who is now elected M.L.A. from Ravpura Constituency of Baroda, made certain allegations against the Hon'ble Minister as well as against the appellant alleging that though the appellant had indulged in black marketting activities, he was not detained though other persons were detained. There was exchange of letters as also statements and counter statements between the respondent No.3 on the one hand and the Hon'ble Minister for Civil Supply on the other. The Hon'ble Chief Minister had to intervene in the matter. In these circumstances, though the appellant had not committed any illegality or irregularity and that power of attorney granted in favour of appellant by Girdharilal Demala was revoked and thus there was no necessity and/or earthly reason to pass an order of detention against the appellant on April 24,1998, the order was passed by the second respondent directing appellant to be detained. When the appellant came to know about the order, he immediately approached this court for appropriate writ, direction and/or an order in the nature of mandamus quashing and setting aside the said order passed by the District Magistrate, Baroda Respondent No.2, being illegal, ultra vires, unconstitutional and violative of his fundamental rights.

#. Notice was issued by the Learned Single Judge, pursuant to which the respondents appeared. A preliminary objection was taken before the Learned Single Judge by the respondents that since appellant had not accepted the order of detention and had not surrendered, the petition filed by him was not maintainable. The Learned Single Judge heard the parties, perused the relevant file and observed that the submissions made by the learned counsel for the petitioner could not be upheld. In the opinion of the learned Single Judge, it could not be said on the facts and circumstances of the case, that the order was malafide. The learned Single Judge observed;

"I have perused the order of detention as well as the grounds of detention. On mere perusal of the same, it appears that the detaining authority has independently applied mind and taken the decision on the basis of the material placed before it including the admission of the petitioner about his involvement in the illegalities and the black marketing activities. Assuming that the impugned

order is passed at the instance of the Hon'ble Minister, in that event also, it can safely be observed that he had taken action when his attention was invited to the alleged illegality committed by the petitioner for which the concerned Minister cannot be faulted with. One can understand, if no action is taken inspite of the attention of the concerned Minister was invited, in that event, there are all possibilities that the concerned Minister can be said to be a man siding the illegality or encouraging the black marketing activities. But here is a case where action is taken by the detaining authority after by considering the relevant materially and after subjectively satisfying about the necessity to detain the petitioner for preventing him from carrying on the said illegal activities which were prejudicial to the maintenance and supply of essential commodities. It is always open to the petitioner to challenge the said order by taking appropriate proceedings insteading of avoiding the same. In view of the facts and circumstances of the case, it is difficult for this Court to hold that the order of detention is malafide."

#. We have heard Mr.B.S.Patel, learned counsel for appellant and Mr.Prashant G. Desai, learned Government Pleader on behalf of respondents 1 and 2. Respondent No.3 has not appeared.

#. Mr.Patel contended that the Learned Single Judge has committed an error of law in holding that the petition filed by appellant - petitioner was not maintainable at law. He submitted that as held in various decisions by the Hon'ble Supreme Court as well by this court, a petition at pre execution stage, is maintainable and if the court is satisfied that no detention order could have been passed by the authority, the court would grant appropriate relief by issuing an appropriate writ, direction or order.

#. Mr.Patel also submitted that the impugned order of detention was clearly malafide and malicious. There was no real or rational subjective satisfaction on the part of the detaining authority - respondent No.2. It is settled law, Mr.Patel submitted, that if there is no real and genuine satisfaction by the detaining authority, an order of detention would be bad in law.

#. Mr. Patel argued that order cannot be said to be

preventive in nature but in substance and in reality it is punitive one. For that it was submitted that certain irregularities were found by the Civil Supply Department in the business of Demala Enterprise and power of attorney issued in favour of appellant came to be revoked by Girdharilal Demala. The appellant was thereafter neither working as Power of Attorney Holder of Girdharilal Demala nor as Manager of Demala Enterprise. In these circumstances, passing of an order of detention against the appellant "with a view to preventing him from acting in any manner prejudicial to maintenance of supplies of commodities essentials to the community" was uncalled for. The action taken only with a view to teach lesson to the appellant, which requires interference.

#. Mr. Patel contended that before taking a drastic step of detaining a person and depriving him of his personal liberty, alternative modes available to the authorities ought to have been considered. In the instant case, it is not done. Though appellant was no more working as Manager and in the light of the cancellation of power of attorney by Girdharilal Demala, he had nothing to do with the business of Demala Enterprise, an action was taken. The detaining authority had not applied his mind to other alternatives; such as filing of criminal complaint, prosecution of appellant, suspension, revocation or cancellation of licence of Demala Enterprise where appellant was working etc. Without considering those matters, an order of detention was passed. It is in colorable exercises of power and requires to be quashed.

#. Finally Mr. Patel submitted that even if the Learned Single Judge was not satisfied that there were circumstances, which were sufficient to grant relief in favour of the appellant at pre-execution stage, he could not have made observations on merits. If Court did not think fit to entertain the petition at pre-execution stage, it ought to have dismissed the petition without entering into merits of the matter.

##. Mr. Desai, Learned Government Pleader on the other hand, supported the order passed by the learned Single Judge. According to him, the Learned Single Judge has not committed any illegality in not entertaining the petition at pre execution stage. Mr. Desai conceded that a petition filed at pre execution stage is maintainable but as a normal rule, a Court would not entertain a petition by interfering with the process of detention as such an action would make the provisions relating to Prevention Detention laws almost nugatory.

##. On merits, Mr.Desai submitted that all the questions which were sought to be agitated by the learned counsel for appellant, were on merits of matter, based on factual matrix. Those questions therefore could be decided only after an order is served and the grounds are supplied to the appellant. Regarding malafide exercise of power by the respondent No.2, he submitted that as the petition was summarily dismissed by the Learned Single Judge, no affidavit was filed then. But as the notice was issued by the Division Bench, Mr.A.G.Mukim, District Magistrate, who is the detaining authority also, has filed an affidavit, wherein he has stated that in exercise of powers under sub section (2) of Section 3 of the Act, he had passed an order and the said order could not be said to be illegal or contrary to law. It was also stated in the counter that the order was not malafide and it was not passed at the instance of respondent No.3. Having applied his mind to the facts and circumstances and relevant material placed before him, he was satisfied that detention of the appellant was necessary.

##. Mr.Desai also submitted that there is an additional reason for refusing relief in favour of the appellant, even if some case can be said to have been made out by him. Mr.Desai submitted that the detaining authority has stated that though an order of detention was passed, the appellant could not be served. The appellant, according to the detaining authority, evaded service of order of detention. The appellant was absconding and a notification was required to be issued declaring him as absconder. An action was also taken for attachment of his property. Mr. Desai, therefore, submitted that no illegality was committed by the Learned single Judge and the appeal deserves to be dismissed.

##. Having considered the rival contentions of the parties, we are of the view that the final order passed by the Learned Single Judge does not deserve interference. It is an admitted fact that an order was passed on April 24, 1998 but the appellant could not be served. There is word against word in as much as according to the detaining authority, the appellant is avoiding service whereas the case of the appellant is that he had gone out of Gujarat for some personal work. The fact, however, remains that the appellant could not be served with the order of detention, and he was declared as an absconder on May 25,1998 and a notification was issued on 6th July,1998 for attachment of his property.

##. In Additional Secretary to the Government of India and others Vs.Smt.Alka Subhash Gadia and another, 1992 Supp (1) SCC 496, Their Lordships of the Hon'ble Supreme Court enumerated certain exceptional cases in Para 30 in which a Court may interfere with an order of detention at pre-execution stage;

- (i) that the impugned order is not passed under the Act under which it is purported to have been passed
- (ii) that it is sought to be executed against a wrong person,
- (iii) that it is passed for a wrong purpose,
- (iv) that it is passed on vague, extraneous and irrelevant grounds; or
- (v) that the authority which passed it had no authority to do so.

The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

##. In Subhash Muljimal Gandhi Vs. Himingliana and another,(1994), 6 SCC 14, the Hon'ble Supreme Court reiterated the grounds mentioned in Alka Subhash Gadia and observed that on such contingency or the same species can be taken into account by a Court of law while entertaining petition at pre execution stage.

##. In Elesh Nandubhai Patel Vs. C. P. Singh, Commissioner of Police, Ahmedabad City and others (1997) 2, GLR 1063, almost an identical case, came up for consideration before a Division Bench consisting of one of us (Coram : C.K.Thakkar, J.). In that case, also it was contended that though the incident was of remote past, an action of detaining the appellant under the Prevention of Anti Social Activities Act, 1985 was taken. It was the contention of the appellant that after change of Government, the action was taken against the detenu at the instance of the Hon'ble Minister. There was no satisfaction by the detaining authority and the order was clearly malafide and de hors the Act. There also a

preliminary objection was raised by the authorities that the petition was not maintainable at pre-execution stage. The petition was dismissed and LPA also met with the same fate. Dealing with the question as to whether a petition at pre execution stage would be tenable, the Division Bench observed;

"Now, it cannot be gainsaid that a petition is maintainable even at pre-execution stage. At the same time, however, looking to various decisions of the Apex Court as well as of this Court, we are of the view that normal rule, which the learned Single Judge has read from those decisions is that the Court would hear such petition against order of detention after the order is passed and the detenu surrenders to custody. Strong objection was taken against the order passed by the learned single Judge when it was observed that "such petitions could be heard only after the proposed detenu, who has rushed, to the Court even before the service of the detention order, surrenders to the detention order". Without entering into larger question, in our opinion, when the learned single Judge has exercised discretion that the petition may be listed for hearing subject to the condition that the appellant furnishes proof that he has surrendered to the detention order, it cannot be said that there is illegal exercise of discretionary power on his part."

Regarding malafide exercise of power, the Court proceeded to state;

"In the instant case, serious allegations of malafide have been levelled against the detaining authority as also against respondent Nos.3 & 4. The detaining authority and respondent No.3 have filed affidavits controverting those allegations. We may hasten to add that we are not expressing any opinion one way or other as the matter is pending before the learned single Judge, but, in light of these facts, when the learned single Judge has imposed the condition, it cannot be said that he has committed any illegality or the order is otherwise bad in law."

##. In the instant case, whether an action was taken in colorable exercise of power or it was malafide or whether there was settlement between respondent No.3 on one hand and the Government on the other, can be decided

only after the detenu is served with the order and grounds of detention. As and when the grounds were supplied and the legality and validity of the order of detention based on the grounds supplied to the detenu would be considered by the court, it would pass an appropriate order. But at this stage obviously, a Court cannot speculate or be able to record a finding that the order was passed by the detaining authority at the behest of third party. This is particularly true in view of the affidavit in reply filed by the detaining authority in which he has stated that he had applied his mind and in the facts and circumstances, he was satisfied that an order was required to be passed under Section 3(2) of the Act. We are, therefore, of the view that the learned Single Judge, by not entertaining a petition, has not committed any error of law.

##. We must also state that we are also impressed by the second objection raised by Mr. Desai for not entertaining the LPA. In our opinion, if a person against whom an order of detention is passed, is avoiding or evading service of order and/or is absconding, the said circumstance is indeed a relevant, germane and material and should be borne in mind by a Court while considering his prayer for quashing such order. In the instant case, the detaining authority in the affidavit has stated as under :

"I submit that as the petitioner is evading service of the order of detention, the notifications declaring the applicant as an absconder are also required to be passed on 25.5.1998. I submit that a notification dated 6th July, 1998 has also been passed for the attachment of the property of the petitioner."

##. In similar circumstances, in Kalavati wife of Hasmukhlal Kantilal Modi Vs. State of Gujarat, LPA No. 734 of 1997 in SCA 3318 of 1997 decided on 17-7-1997, one of the questions raised was whether in exercise of extraordinary powers under Article 226 of the Constitution of India, a Court can grant relief in favour of a person against whom an order of detention was passed and who was absconding. Dealing with such a situation, one of us (Coram : C.K. Thakkar, J.) considered the circumstance of absconding of detenu and praying for a writ of mandamus and observed;

"There is yet another reason for not interfering with the order passed by the learned Single Judge at this stage. As stated in affidavit-in-reply,

the order was passed by detaining authority as early as on February 1,1997. It was attempted to be served through DSP, Ahmedabad (Rural) upon the tetenu, but the detenu either absconded or had concealed himself and the order could not be served. That reasons also, in our opinion, sufficient for not exercising extraordinary powers under Article 226 of the Constitution. It has been so held by the Supreme Court in Alka Gandhi and Subhash Gandhi. No doubt, Mr.Raval controverted the statement made by the detaining authority that the detenu is absconding. He urged that when a petition can be filed at pre-execution stage, the detenu would naturally not surrender to custody as he wants relief at pre-detention stage. If an order will be implemented or executed and a person is taken in custody, the paramount object of permitting a tetenu to present a petition at pre-execution stage would become nugatory. Mr.Raval, however, forgets that when an averment is made that an order is passed before more than five months and inspite of the efforts by the police authorities, the order could not be served upon him, and that a notification was required to be issued under Section 7(a) of the Act, in our considered opinion, this Court would refrain from exercising extraordinary jurisdiction to help such a person." [ Emphasis supplied ]

Our attention was invited to the fact that the above order was carried to the Hon'ble Supreme Court in SLP (Civil) No.14524 of 1997 and leave was refused by the Hon'ble Supreme Court vide an order dated August 21,1997. In the facts and circumstances of the case on hand also, in our opinion, it is not appropriate to entertain LPA at the instance of appellant, who, according to the allegation and assertion of the detaining authority, evaded service and absconded. A notification was issued to that effect and his property was also attached.

##. But as far as the last contention of Mr.Patel is concerned, we are of the view that there is considerable force in it and the grievance can be said to be well founded. When the learned single Judge did not think it fit to exercise extraordinary jurisdiction under Article 226 of the Constitution at pre execution stage and did not entertain a petition, it was not necessary for him to make any observation on merits. In fact, in such cases, it would not be appropriate to dwell upon merits of the matter as it may cause prejudice in sbusequent

proceedings. In Elesh Nandubhai Patel, the Division Bench specifically observed that the Court had not entered into merits of matter and no opinion was expressed on the correctness or otherwise of allegations levelled against the detenu.

##. Very recently, in Union of India Vs. Parasmal Rampuria, JT 1998 (2) SC 531, the Hon'ble Supreme Court has specifically observed that the orders granting ad interim relief against detention and continuing it from time to time was contrary to law and uncalled for. The Court, therefore, vacated ad interim relief granted by the High Court and observed that no such ad interim relief be continued at pre detention stage. The Court, however, stated;

"We make it clear that we make no observation on the merits of the controversy centering round this detention order. The said controversy will have to be resolved by the High Court in the pending writ petition after hearing the contesting parties." (Emphasis supplied)

##. In view of the settled legal position, in our view, it was not necessary for the learned Single Judge to make any observation on merits of the matter. All the observations made by the learned Single Judge, therefore, would not come in the way of appellant, as and when he takes appropriate proceedings against an order of detention after the order is served and he surrenders.

##. For the foregoing reasons, we see no reason to interfere with the order of final dismissal of the petition passed by the learned single Judge. This LPA deserves to be disposed of with observations made

hereinabove. In the facts and circumstances of the case, there shall be no order as to costs.

(C.K.Thakkar,J.)

Dt : 25-08-1998 (A.M.Kapadia,J.)

(KPP)

